a direction will be unnecessary. The effect of my judgment is that it is open to both parties to raise issues relevant to ancillary relief if and when a dissolution of the marriage is pronounced at which stage the terms of the agreement arrived at between the parties will be relevant and the court will have to consider what if any weight should be given to its terms.

Since the order that is the subject of this application was a consent order to which the wife was a consenting party and in view of the fact that one of the two grounds in support of the application has been found to be without merit I order that each party bear its own costs of and incidental to the application.

Order accordingly.

Solicitors: *Chai Chew & Co.; Shearn Delamore & Co.*

JOGINDER SINGH v. PUBLIC PROSECUTOR

[A.Cr. J. (Ajaib Singh J.) July 8, 1983]
[Ipoh – Perak Criminal Appeal No. 186 of 1982]

Criminal Law & Procedure – Charge of falsely causing institution of criminal proceedings in respect of dangerous drugs against four persons – Accused sentenced to 2 years' imprisonment – Appeal – Whether trial in Sessions Court a nullity for want of sanction of Public Prosecutor as required under Criminal Procedure Code (F.M.S. Cap. 6), s. 129(i)(b) – Penal Code (F.M.S. Cap. 45), s.211 – Criminal Procedure Code (S.S.Cap.21) (repealed), ss.39. 306(3) & 448 – Criminal Procedure Code (F.M.S. Cap. 6), ss.129(i)(b) & 422 – Criminal Procedure Code 1898 (India), ss. 195 & 537.

Judicial Precedent – Decision of court of 3 judges empanelled under s.306(3), Criminal Procedure Code (S.S. Cap. 21) not binding on High Court of co-ordinate jurisdiction.

The appellant in this case was charged in the Sessions Court under section 211 of the Penal Code with falsely causing the institution of criminal proceedings in respect of dangerous drugs against four persons. The appellant pleaded guilty and was sentenced to 2 years' imprisonment and he appealed against the sentence.

At the outset of the hearing of the appeal counsel for the appellant raised for the first time a preliminary point that the trial in the Sessions Court was a nullity because it had proceeded without a sanction of the Public Prosecutor as required under section 129 (i)(b) of the Criminal Code (F.M.S. Cap.6).

Held: (1) by virtue of the provisions of section 422 of the Criminal Procedure Code, the conviction of the appellant in the Sessions Court should not be set aside unless it can be shown that the want of sanction has occasioned a failure of justice. In this case there was not the slightest suggestion whatsoever that the want of sanction had occasioned a failure of justice;

(2) on an appeal on sentence from the subordinate courts the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate court had failed to adequately consider all relevant factors either for or against the offender;

(3) there were no merits in this appeal and no extenuating circumstances whatsoever which can be taken in favour of the appellant. The learned President of the Sessions Court considered the case very carefully from every angle and having done so he quite rightly took a serious view and imposed the maximum of 2 years. There was therefore no reason to interfere with the sentence and the appeal should be dismissed.

Per Curiam: "In the case of *Hassan bin Isahak*(2) the court had expressed its opinion that section 448(b) of the Criminal Procedure Code (S.S. Cap.21) should be repealed as was done in India in 1923 when the equivalent of this provision in the Indian Criminal Procedure Code of 1898 was repealed by Act XVIII ... speaking for myself I would say that there is no valid reason why there should be any repeal as suggested in the case of *Hassan bin Isahak.* Justice is well served by section 422 of the Criminal Procedure Code (F.M.S. Cap. 6) for it enables a superior court sitting in appeal or in revision to remedy technical defects, which may have inadvertently arisen in a trial "defects which ought not to be made the means of culprits escaping the just penalties of their crimes".

Cases referred to:

(1) *Emperor* v. *Johri* A.I.R. 1931 All. 269.
(2) *Hassan bin Isahak* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 179.
(3) *Muthu Moopan & Anor.* v. *Rex* I.L.R 1937 Mad 664.
(4) *Pitchaykutty* v. *Public Prosecutor* [1961] M.L.J. 293.
(5) *Sunder Dasadh* v. *Mahto & Ors.* (1901) I.L.R. Cal 217.
(6) *Perumalla Nayudu* v. *Emperor* (1908) I.L.R. 21 Mad. 80.
(7) *Emperor* v. *Tribhovandas Brijbhukandas* (1902) 26 Bom. 533, 537.
(8) *Bhajja* v. *Emperor* A.I.R. 1939 All 238, 240.
(9) *Salleh & Anor.* v. *Rex* 10 S.S.L.R. 27.

CRIMINAL APPEAL.

Karpal Singh (*Gurbachan Singh* with him) for the appellant.

Miss Tee Hong Geok (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ajaib Singh J.: The appellant was charged in the Sessions Court under section 211 of the Penal Code with falsely causing the institution of criminal proceedings in respect of dangerous drugs against four persons. The offence in this case carried a maximum of 2 years' imprisonment or a fine or both. The appellant pleaded guilty and was sentenced to 2 years' imprisonment and he now appeals against the sentence.

The appellant was operating a restaurant known as the Express Restaurant along Jalan Kuala Kangsar. Nearby were two other restaurants under the names of Raya Restaurant and Rashid Restaurant and these two restaurants appeared to attract more business than that of the appellant.

Motivated by a sense of rivalry and jealousy the appellant decided to fix up the owners of these two rival restaurants. On June 19, 1982 at about 4.00 p.m. the appellant telephoned the Anti-Narcotic Branch in Ipoh, identified himself as John and told DPC Sivanesan of the Anti-Narcotic Branch that a consignment of drugs was to be conveyed by a MARA bus from Butterworth to Ipoh. Later at about 8.00 p.m. the same day the appellant met DPC Sivanesan and Detective Corporal Alagesan by appointment in Jalan Station. He introduced himself as John who had telephoned and spoken to DPC Sivanesan earlier that day. The appellant informed these two police detectives that a MARA bus would be conveying a consignment of drugs the following day at about 1.30 p.m. from Butterworth for delivery to the owners of Raya Restaurant. He said he would provide the particulars of the bus the next day.

On June 20, 1982 the appellant drove in a Mercedez car to Butterworth taking along with him his fiancee and two friends after having informed them that he intended to go over to Penang. On the way he bought two bunches of rambutans and upon arriving at Butterworth he parked his car near the bus station. The appellant then took out a cardboard box from the boot of the car and handed the box and the two bunches of rambutans to his friend Vijayan who had accompanied him in the car and told him to hand the articles over to a MARA bus driver who was scheduled to proceed to Ipoh with the request that the articles be delivered to the proprietor of Raya Restaurant failing which to the proprietor of Rashid Restaurant along Jalan Kuala Kangsar in Ipoh. Vijayan then handed the articles to the driver of MARA bus No. BU 4452 and gave the necessary instructions to the driver and paid him $4 for this service. The bus however was scheduled to stop not at Raya Restaurant but at Rashid Restaurant.

The appellant then told Vijayan and his companions that he would return to Ipoh immediately as he had some urgent business. On the way the appellant telephoned DPC Sivanesan and informed him that MARA bus No. BU 4452 was on its way to Rashid Restaurant instead of Raya Restaurant in Jalan Kuala Kangsar. He said that the drugs were concealed in a card-board box together with two bunches of rambutans and that the drivers of the bus would be delivering these articles to the owner of Rashid Restaurant around 1.30 p.m.

The police then set up an ambush and at about 2.00 p.m. when the MARA bus driver and his co-driver were delivering the rambutans and the card-board box to Kadir an employee of Rashid Restaurant the police rushed in and arrested the two bus drivers and Kadir. Dorairaj a partner of the restaurant who was at the counter inside the restaurant was also arrested. All the four were brought to the police station where they were detained overnight and released on police bail the next day. On analysis the contents of the box were found to contain 5.73 grammes of heroin and 2.07 grammes of cannabis.

Upon strong denials by all these four persons the police became suspicious as to the truth of the allegations made by the appellant. Subsequent investigations revealed that the appellant had falsely fixed up these four innocent people.

"A man who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of section 211 (Penal Code) and if the offence falls within the description in the latter part of the section he is liable to the punishment there provided. Making of a false charge to the police of a cognizable offence is the institution of criminal proceedings within the meaning of section 211." *Emperor* v. *Johri*[1].

And so the appellant was in due course arrested and charged in the Sessions Court under section 211 of the Penal Code. On October 6, 1982 he pleaded guilty and was sentenced to 2 years' imprisonment.

At the outset of the hearing of the appeal Mr. Karpal Singh for the appellant raised for the first time a preliminary point that the trial in the

Sessions Court was a nullity because it had proceeded without a sanction of the Public Prosecutor as required under section 129(i)(b) of the Criminal Procedure Code (F.M.S. Cap 6). Section 129 reads as follows:–

129(i) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognizance –

(a) of any offence punishable under sections 172 to 168 of the Penal Code except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;

(b) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, or 228 of the Penal Code except with the previous sanction of the Public Prosecutor or when such offence is committed in or in relation to any proceedings in any Court on the complaint of such Court;

(c) of any offence described in section 463 or punishable under section 471, 475 or 476 of the Penal Code except with the previous sanction of the Public Prosecutor, or when such offence has been committed by a party to any proceeding in Court in respect of a document given in evidence in such proceeding on the complaint of such court.

(ii) The provisions of subsection (i) with reference to the offences named therein apply also to the abetment of such offences and attempts to commit them.

(iii) The sanction referred to in this section shall be in writing and may be expressed in general terms and need not name the accused person, but it shall so far as practicable specify the Court or other place in which and the occasion on which the offence was committed.

(iv) When such sanction is given in respect of any offence referred to in this section the Court taking cognizance of the case may frame a charge of any other offence so referred to which is disclosed by the facts.

(v) No such sanction shall remain in force unless acted upon within one month from the date on which it was given.

Mr. Karpal Singh cited the case of *Hassan bin Ishak* v. *Public Prosecutor*[2] which was an appeal from the District Court and heard by a court of three judges constituted under the provisions of section 306(3) of the Criminal Procedure Code (S.S. Cap. 21). Chapter XXVIII of the repealed Criminal Procedure Code (S.S. Cap.21) deals with appeals in criminal matters from the Lower Courts to the High Court of which section 306(3) is as follows:–

306(3) An appeal shall ordinarily be heard by a single Judge, but any appeal shall, on the request in writing of the Public Prosecutor at any time before the hearing or on the order of a Judge at any time before judgment, be reserved for hearing and be heard before a Court consisting of three or more Judges.

The facts in the case of *Hassan bin Isahak* v. *Public Prosecutor* appear in the head-note as follows –

The appellant in this case was charged in the alternative with committing offences contrary to sections 177 and 181 respectively of the Penal Code and the case originally came up for trial before the District Court Judge at Butterworth on July 24, 1947. After the evidence of the witnesses for the prosecution had been recorded the learned Judge realised that the requirements of section 139 of the Criminal Procedure Code had not been fulfilled. That section provides, *inter alia*, that no court shall take cognizance of any offence punishable under sections 177 and 181 of the Penal Code except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate. In this case the Public Prosecutor had not given his previous sanction and the complaint was not made by the public servant concerned or by a public servant to whom he was subordiante. Before calling on the defence the learned District Court Judge terminated the proceedings and "released" the accused. The sanction of the public prosecutor was then obtained and the appellant was again charged in the alternative with committing the same offences as those before the Court on the 24th July. He pleaded *autrefois acquit*, but the plea was rejected and on October 6, 1947 he was convicted in the alternative of committing either an offence contrary to section 177 or contrary to section 181 of the Penal Code and sentenced to six month rigorous imprisonment. Appellant then appealed to the High Court against both conviction and sentence and the learned Judge of that Court sitting at Penang exercised his power under section 306(3) of the Criminal Procedure Code to reserve the hearing of the appeal for a Court of three Judges.

With regard to the non-compliance with section 139 of S.S. Cap 21 (which is *in pari materia* with section 129 of F.M.S. Cap 6) the court held that "in the absence of the sanction of the public prosecutor the proceedings in the District Court on July 24, 1947 were null and void".

In delivering the judgment of the court Pretheroe Ag. C.J. said –

Mr. Conaghan (for the appellant) called in aid section 448 (b) of the Criminal Procedure Code which provides that no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of "the want of any sanction required by section 139 of the Code". The latter part of the section qualifies the provision we have quoted, but it is certainly a strong argument to support the contention that want of sanction under section 139 does not deprive the trial court of jurisdiction.

A great weight of judicial decisions is however against his submission, and we are in agreement with those decisions.

In our opinion the want of the prior sanction of the public prosecutor under section 139 deprives the Court of jurisdiction, and any proceedings in such circumstances are a nullity. We agree with the decision of *Muthu Moopan & Anor.* v. *R.*[3], and with the reasons given for arriving at that decision. Also it is significant that the provision in the Indian Criminal Procedure Code which was identical with section 448(b) of our code was repealed in the year 1923. In our opinion that provision in our Code should also be repealed. From the foregoing it will be clear that the first ground of appeal fails because, in the absence of the sanction, the proceedings in the District Court on July 24th were null and void and consequently the appellant was never in peril on that day.

Hassan's case was discussed and accepted by Rigby J. in the case of *Pitchaykutty* v. *Public Prosecutor*[4]. In that case the appellant was convicted under section 182 of the Penal Code in that he had made a false complaint on July 7, 1960. The sanction was however by mistake dated June 5, 1960 instead of July 7, 1960 as the date of the offence. Appellant's counsel submitted on appeal that the trial of the appellant in the lower court was a nullity for want of sanction as required under section 139 of the Criminal Procedure Code in respect of the offence committed on July 7, 1960. Rigby J. held –

(1) for an offence under section 182 of the Penal Code the absence of a sanction under section 139 of the Criminal Procedure Code renders all proceedings before a Magistrate null and void even if the want of sanction occasions no miscarriage of justice.

(2) the sanction was defective by reason of a wrong date having been inserted. This was an error and no more and was therefore curable under section 448(a) of the Criminal Procedure Code the defect in no way occasioning a failure or justice.

The case of *Muthu Moopan (supra)* was decided in relation to certain provisions of the Indian Criminal Procedure Code of 1898 and it was held by the Full Bench of the Madras Appellate Criminal Court that –

Where a magistrate, who, though empowered by section 28, Criminal Procedure Code, to try an offence under section 186, Indian Penal Code, is prevented by section 195, Criminal Procedure Code, from taking cognizance of the offence except on the complaint of the public servant concerned or of some one to whom he is subordinate, acquits the accused, after framing a charge and recording defence evidence, on the ground that the requisite complaint had not been filed, his trial, charge and judgment of acquittal are all void under section 530, Criminal Procudure Code and section 403(1), Criminal Procedure Code, is no bar to the trial of the accused for the same offence on a complaint filed by the public servant concerned.

In delivering the judgment of the court King J. said –

According to section to section 530 of the Code, if any Magistrate "not being empowered by law in this behalf" tries an offender his proceedings shall be void. The Sub-Magistrate of Erode was certainly empowered by section 28, Criminal Procedure Code, to try an offence under section 186, Indian Penal Code, but was he empowered to try these offenders for this particular offence? Clearly not, for section 195, Criminal Procedure Code, prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was therefore void.

His charge was void. His judgment of acquittal was void. There is nothing by which the accused can compel the Court to recognise in support of a plea under section 403.

Section 195 of the Indian Criminal Procedure Code 1898 so much as may be relevant to the present appeal is as follows –

195(1) No Court shall take cognizance –

(a) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, except with the previous sanction, or on the complaint, of the public servant concerned or of some public servant to whom he is subordinate;

(b) of any offence punishable under sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the same Code, when such offence is committed in, or in relating to, any proceeding in any Court, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate;

(c) of any offence described in section 463 or punishable under section 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate.

By Act XVIII of 1923 the words "with the previous sanction" appearing in section 195(1) (a)(b) and 9c) *(supra)* were deleted.

Section 448 of the Criminal Procedure Code (S.S. Cap. 21) referred to in the judgment in *Hassan's case* is similar to section 422 of the Criminal Procedure Code (F.M.S. Cap. 6). Section 448 (S.S. Cap. 21) is as follows –

448 Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of –

(a) any error, omission or irregularity in the complaint,

summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code; or

(b) the want of any sanction required by section 139; or

(c) the omission to settle or revise any list of jurors; or

(d) the want of qualification of any juror; or

(e) the improper admission or rejection of any evidence; or

(f) any misdirection in any charge to a jury;

unless such error, omission, improper admission or rejection of evidence, irregularity, want of misdirection has occasioned a failure of justice.

The equivalent of the above section is section 537 of the Indian Criminal Procedure Code of 1898 which is as follows –

537 Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chaper XXVII or on appeal or revision on account –

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of the want of or any irregularity in any sanction required by section 195, or any irregularity in proceedings taken under section 476, or

(c) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, want or misdirection has in fact occasioned a failure of justice.

Explanation – In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

Sub-section (1)(b) of the above section 537 was also deleted by the same Act XVIII of 1923.

Before the amendments by Act XVIII of 1923 the High Courts in India sitting in appeal or revision consistently applied the provisions of section 537 of the Criminal Procedure Code and held that proceedings in the lower courts were not vitiated by want of sanction under section 195 unless such want of sanction had in fact occasioned a failure of justice. In the case of *Sunder Dasadh* v. *Mahto & Ors.*[5] the accused was convicted in the magistrate's court under section 206 of the Penal Code which required a sanction under section 195 of the Criminal Procedure Code. The requisite sanction was however not given and the case was referred to the High court where it was held that "where such an offence was taken cognizance of by a magistrate without sanction for the prosecution being given, as should have been the case, but there was nothing in the proceeding to show that the want of such sanction had in fact occasioned a failure of justice the conviction was not bad only on that account". In delivering the judgment of the court Prinsep J. said

"No doubt sanction to the prosecution should have been given before the magistrate took cognizance of that offence, but unless the want of such sanction has in fact occasioned a failure of justice (section 537 Code of Criminal Procedure) the conviction is not bad only on that account. There is nothing in the proceedings to show that this is so. We therefore find no sufficient reason to interfere in revision".

In *Perumalla Nayudu* v. *Emperor*[6] it was held by the Appellate Criminal Court with reference to charges under sections 211 and 216 of the Penal Code that:–

The words 'subject to the provisions hereinbefore contained' in section 537 of the Code of Criminal Procedure must not be construed in such a way as to nullify the provisions of clause (b) of the same section that no sentence of a court of competent jurisdiction shall be reversed on appeal 'for want of any sanction required by section 195.'

Want of sanction under section 195 is no ground on appeal for setting aside a conviction after trial for any offence mentioned in the section.

In overruling the preliminary objection on the question of the want of sanction the court in the case of *Perumalla Nayudu* stated as follows:–

It is argued for the appellant that the conviction for offences punishable under sections 195 and 211 of the Indian Penal Code is illegal because the sanction required by section 195 of the Code of Criminal Procedure was not obtained. In support of this argument the case of *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* I.L.R. 22 Cal. 176 is relied upon; but that case has been expressly dissented from by a Bench of this court in the case of *Ismal Rowther* v. *Shunmugavelu Nadan* I.L.R. 29 Mad. 149 where it was held that the special provision in section 537(b) of the Code of Criminal Procedure cannot be nullified by the general provision in section 195 of the Code of Criminal Procedure. We agree with this view. The words 'subject to the provisions hereinbefore contained' which occur at the beginning of section 537 cannot be construed in such a way as to nullify the express provision of the latter part of the section, which in clause (b) enacts that no sentence passed by a court of competent jurisdiction shall be reversed on appeal "for want of any sanction required by section 195". There are other sections besides section 195, such as sections 132, 196 and 197 of the Code of Criminal Procedure, which require sanction to be obtained in certain cases, and these sections are not affected by section 537(b). Full effect, therefore, can be given to the opening words of the section without construing them as referring to section 195. Moreover, on principle, it is diffi-

cult to see why the want of sanction under section 195 should be held to be a good ground for setting aside a conviction after trial. Before trial, no doubt, a man is presumed to be innocent, and it is reasonable to protect him from prosecution for the offences specified in section 195 unless and until a competent authority is of opinion that there is sufficient ground for an enquiry and sanctions the prosecution. But it is different when the result of the trial has shown that the guilt of the accused is no longer a matter of doubt, but has been proved in a formal trial. We therefore overrule the preliminary objection.

The scope of section 537 is stated as follows in *Sohoni's* Code of Criminal Procedure 15th edition Vol III page 3106 –

Section 537 lays down in general that no finding, sentence or order passed by a competent court should be reversed or altered in appeal or revision on account of any error, omission or irregularity in the proceedings before or during trial unless it has occasioned a failure of justice. The Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is accorded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice.

A comment in *Prinsep's* Criminal Procedure Code 13th ed 1901 at page 532 states:–

There may be no sanction, or a sanction irregularly or imperfectly expressed, and in such a case it will be for a Court of Appeal or Revision to consider whether this has in fact occasioned a failure of justice. This is an instance of a case in which while the Code expressly prohibits a Magistrate to take cognizance of certain offences without sanction under section 195, it afterwards declares that notwithstanding this prohibition no finding or order in a case in which a Magistrate or Court has proceeded without such sanction shall be reversed or altered unless such omission has in fact occasioned a failure of justice.

It should be noted that this Code requires previous sanction before a prosecution can be entertained for other offences (sections 132, 197), but proceedings in such cases without previous sanction are not specifically provided by by section 537. In regard to certain offences the previous complaint of some specified authority or person is necessary before a Magistrate can take cognizance of such offences – (sections 196, 198, 199: see notes thereunder).

There is thus

"a distinction between a case in which the trial itself is contrary to law in which event it is no trial at all under the Code, and a case in which the trial is one within the jurisdiction of the Magistrate and irregularities occur in the method of conducting it. In the latter case the provisions of section 537 are applicable and the finding can only be reversed if the irregularity has in fact occasioned a failure of justice" – *Emperor* v. *Tribhovandas Brijbhukandas*(7).

It is obligatory on the part of the High Court in the exercise of its appellate jurisdiction to consider and give effect to the provisions of section 422 of the Criminal Procedure Code (F.M.S. Cap. 6) if and when a point is raised on appeal in relation to the non-observance of the provisions of section 129 of the Criminal Procedure Code. Allsop J. in the case of *Bhajja* v. *Emperor*(8) summed up this proposition as follows –

The provisions of section 537 are mandatory and a court is not entitled to set aside a finding, sentence or order of a subordinate court in direct contradiction of the terms of the section. The words "subject to the provisions hereinbefore contained" must refer to the other sections in that Chapter unless there is any specific provision in any other section of the Code which says that any particular error will vitiate proceedings in spite of the fact that no failure of justice has been occasioned by such error.

In the present appeal before me I am of the view that by virtue of the provisions of section 422 of the Criminal Procedure Code the conviction of the appellant in the Sessions Court should not be set aside unless it can be shown that the want of sanction has occasioned a failure of justice. The appellant was represented by counsel, he admitted the facts which constituted the offence and he did not raise the question of sanction in the sessions court. And there is not the slightest suggestion whatsoever that the want of sanction has occasioned a failure of justice.

Another pertinent comment in *Prinsep (supra)* at page 528 is as follows –

"Has in fact occasioned a failure of justice will probably be interpreted to mean, as was expressed in section 233 of the Code of 1872 that 'the accused has been actually prejudiced in his defence, or the prosecutor in his prosecution, by such error.' 'Prejudice' has been held to mean, "being unfairly affected as to his defence on the merits". *Deva Dayal* II Bom 237. It was further stated in that case, that the intention of the Legislature is to remedy defects of a formal character which may have arisen through inadvertence or neglect, defects which the law and the Legislature think ought not to be made the means of culprits escaping the just penalties of their crimes."

In the case of *Pitchaikutty (supra)* Rigby J. appears to have had some reservations in accepting the case of *Hassan bin Isahak*. At page 294 of his judgment Rigby J. said –

In holding that the absence of the sanction rendered the proceedings a nullity the court in *Hassan bin Isahak's case* referred to and relied upon, in particular, the Indian decision of *Muthu Moonpan & Anor.* v. *Rex.* A study of that case, however, makes it clear that the decision of the Indian Court was substantially based upon the provisions of section 530 of the Indian Code of Criminal Procedure which provided that if any Magistrate 'not being empowered by law in this behalf" tries an offender the proceedings shall be void. The court there held that since under section 195 the court had no jurisdiction to try the case in the absence of a sanction to prosecute, having regard to the express provisions of section 530 the Magistrate "not being empowered by law in this behalf" to try the case, the proceedings were void. There is no corresponding section to section 530 of the Indian Code in our Code. No reference was apparently made during the hearing of *Hassan bin Ishak's* appeal to the very much earlier case of *Salleh & Anor.* v. *Rex*[9] which expressly decided, following earlier Indian decisions, that the want of a sanction does not vitiate a conviction, unless there is evidence that a failure of justice has been thereby occasioned. That decision, indeed, gives full effect to the express wording of the latter part of section 448 of the Criminal Procedure Code.

It was held further in the case of *Salleh* (above) that

"In determining whether any error, omission, or irregularity has occasioned a failure of justice within the meaning of section 414 of the Criminal Procedure Code, the court here is entitled to take into consideration the fact whether the objection could and should have been raised at an earlier stage of the proceedings".

In all the circumstances of this case and in the light of the authorities which I have cited I can find no merit whatsoever in the preliminary objection raised on behalf of the appellant. There were three charges preferred against the appellant. The first for being in possession of 5.73 grammes of heroin which carried a sentence of 3 to 14 years' imprisonment plus 6 mandatory strokes of the rotan. The second charge was for being in possession of 2.07 grammes of cannabis which is an offence punishable up to 5 years' imprisonment or a fine of up to $10,000 or both. The third charge was the one to which the appellant pleaded guilty. After the appellant had been sentenced on the third charge the first two charges were withdrawn by the prosecution for reasons which are not apparent in the notes of proceedings. But the grounds of decision of the learned president gives a hint that there was plea-bargaining between the prosecution and the defence. In a sense therefore the appellant should consider himself lucky in that the two serious charges on which there was strong evidence against him had been withdrawn. And now the appellant seeks to avoid being punished for his crime by trying to take advantage of a technicality. Section 422 of the Criminal Procedure Code is just the appropriate provision in the criminal procedure to meet a situation like this so that the appellant may not escape being punished for his crime.

In the case of *Hassan bin Isahak* the court had expressed its opinion that section 448(b) of the Criminal Procedure Code (S.S. Cap. 21) should be repealed as was done in India in 1923 when the equivalent of this provision in the Indian Criminal Procedural Code of 1898 was repealed by Act XVIII. An opinion of a superior court in deciding a case is certainly not binding as a precedent unless it forms part of the *ratio decidendi* and this was not so in the case of *Hassan bin Isahak.* That case is also not binding on the High Court because although it was decided by three judges empanelled under section 306(3) of the Criminal Procedure Code (S.S. Cap. 21) it was nevertheless a decision of the High Court and therefore of co-ordinate jurisdiction. Speaking for myself I would say that there is no valid reason why there should be any repeal as suggested in the case of *Hassan bin Ishak.* Justice is well served by section 422 of the Criminal Procedure Code (F.M.S. Cap. 6) for it enables a superior court sitting in appeal or in revision to remedy technical defects which may have inadvertently arisen in a trial – "defects which ought not to be made the means of culprits escaping the just penalties of their crimes".

In the circumstances therefore I overruled the preliminary objection taken by Mr. Kirpal Singh and decided to hear the appeal against sentence.

Mr. Karpal Singh conceded that the appellant had committed a serious offence but submitted that there were mitigating factors in favour of the appellant. He was a first offender, he had pleaded guilty and he now repents over his actions. Other factors in favour of the appellant were that he comes from a respectable family, his brother is a lawyer and that around the time he committed the offence the appellant lost his father and his mother is now seriously ill. The appellant had got married and his wife is now in the family way. Mr Karpal Singh urged the court to set aside the prison sentence or alternatively to reduce the sentence to a period of four months which the appellant has served by being in custody pending the hearing of the case in the Sessions Court and the appeal in the High Court.

Miss Tee Hong Geok, the Deputy Public Prosecutor, on the other hand, submitted that the sentence should not be reduced as it was in no way excessive in view of the seriousness of the offence which the appellant had committed.

On the question of sentence the courts invariably take certain factors into consideration the first and foremost being the public interest. Then the age of the offender, his health, his character and background, the nature of the offence and the circumstances and the manner in which the offence is committed. The courts are duty-bound to consider all these matters before deciding upon a suitable sentence. On an appeal on sentence from the subordinate courts therefore the High Court will not interfere with the sentence imposed unless it can be shown to its satisfaction that in the circumstances of the particular case the sentence was manifestly excessive or inadequate or that in fixing the sentence the subordinate court had failed to adequately consider all relevant factors either for or against the offender.

The appellant is a first offender and by pleading guilty he has no doubt shown some measure of remorse on his part. But on the other hand the offence which he has committed is of such a grave nature that it outweighs the mitigating factors which have been advanced in his favour. The conduct of the appellant can best be described as despicable and wicked for he had very carefully and meticulously executed his nefarious plan to fix up the owners of the two rival restaurants. To satisfy his greed for making more money in his restaurant business the appellant acted in a most malicious and unscrupulous manner without having any regard whatsoever to the tragic consequences which would have followed if the truth had not prevailed. If not for the good investigations which were carried out by the police four innocent persons would have ended up in prison for anything from 3 years to 14 years plus the mandatory 6 strokes of the rotan which is the prescribed punishment for possession of heroin of 5 grammes or more in weight.

There are no merits in this appeal and no extenuating circumstances whatsoever which can be taken in favour of the appellant. The learned President of the Sessions Court considered the case very carefully from every angle and having done so he quite rightly took a serious view and imposed the maximum sentence of 2 years. I can find no reason to interfere with the sentence. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Karpal Singh & Co.*

NG CHENG KIAT v. OVERSEAS UNION BANK

[A.C.J. (Wan Hamzah J.) January 3, 1984]
[Kuala Lumpur – Civil Appeal No. 31 of 1982]

Banking Law – Cheques – Current account – Closing of customer's account – Failure to inform – Subsequent deposit of cash into account – Cheques dishonoured – "Account Closed" printed on Cheques – Whether libellous – Damages – Principles applied in assessing damages

Tort – Libel – Dishonour of cheques – "Account Closed" printed on cheques – Words were libellous – Damages – Principles applied.

The plaintiff had a current account with the defendant bank. He had not obtained any overdraft facility from the Bank. He claimed damages against the Bank for failure to honour two cheques drawn by him on that account.

The facts of this case were briefly as follows. On November 29, there was a debit of $4.85 in the plaintiff's account and the Bank closed the account. The Bank, however did not write a letter to the plaintiff to inform him of the closure. On December 7, 1978 the plaintiff received from the Bank Statement of account in respect of November 1978. On December 15, 1979 the plaintiff paid a sum of $3,200 into his account. On the same day the plaintiff drew 2 cheques, Nos. 488534 and 488535 for the sums of $1,600.00 and $582.50 respectively.

On December 16, 1978 Cheque No. 488535 was presented at the Bank's counter. It was dishonoured and returned with the words "Account Closed" printed on it. On December 18, 1978 the plaintiff received a letter from the Bank informing him that his account was closed on November 29, 1978. The plaintiff was also asked to call at the Bank so that refund of the deposit of $3,200.00 could be made to him. On December 19, 1978 cheque No. 488534 was presented to the Bank through the United Asia Bank. It was dishonoured and on the same day it was returned to the United Asian Bank with the words "Account Closed" printed on it. On the same day a cashier's order for the said sum of $3,200.00 was sent by the Bank to the plaintiff by way of refund.

The learned President of the Sessions Court dismissed the plaintiff's claim and the plaintiff appealed against his decision.

Held: (1) cheque No. 488534 was presented to the Bank after the plaintiff had known that his account had not really been kept open again by the payment of $3,200.00 cash into the Bank. Therefore, having informed